UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LUCILLE M. KELLY,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 92-179-P-H***
	)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	)	
	)	
Defendant	)	

AMENDED
RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

This matter is before the court on the defendant's motion to dismiss the plaintiff's amended complaint. At issue is whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, (``ERISA'') or the Labor Management Relations Act, 29 U.S.C. 141 *et seq.*, (``LMRA'') preempts the plaintiff's state-law claims for breach of contract, misrepresentation and fraud, and negligent misrepresentation.

BACKGROUND

The plaintiff originally filed her complaint in state court asserting claims arising from the failure of the defendant (``AT&T'') to credit her with prior employment within the Bell System.[1] Kelly contends that at the time employment was offered by AT&T, and again when she was hired,

[1] Prior to 1985, the plaintiff was employed by various companies that were part of the Bell System. As a result of her employment with these companies, she accumulated between ten and twelve years of seniority. Agreed-upon Statement of Facts 1 (Docket No. 33). She was first hired by AT&T on June 10, 1985 and subsequently incurred two breaks in service. *Id.* 2. As a result of her employment with AT&T, she has earned about seven years of seniority since her date of hire in 1985. *Id.*

the defendant made representations that she would receive ``net credited service"[2] for her previous Bell System employment. Amended Complaint 4 (Docket No. 1b). Kelly was later informed that her prior Bell System service would not be credited to her during her employment at AT&T because AT&T employees who were not on the AT&T payroll in 1983 did not qualify for ``bridging," *i.e.* the crediting of years of prior service within the Bell System. Amended Complaint 5. As a result of not receiving her ``net credited service," the plaintiff asserts that she has suffered damages through her loss of seniority rights, including vacation pay, selection of work schedules and shifts, and reduced pay. She claims that she has also lost retirement and pension benefits in that her eligibility for pension benefits has been delayed so that she will have to work longer before she can retire and receive a pension.[3] Amended Complaint 7-8, 24-25.

PROCEDURAL POSTURE

The defendant removed the case to this court pursuant to 28 U.S.C. 1446(b),[4] asserting that the court has original jurisdiction of the subject matter under sections 1132(e) and (f) of ERISA. Notice of Removal at 2 (Docket No. 1). The defendant then moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), contending that each of the plaintiff's common-law claims is related to an

[2] ``Net credited service" is a form of seniority that determines, in part, vacation pay, work schedules, shift choices, pay scales, retirement and pension benefits, and date of eligibility for those benefits. Answer to First Amended Complaint 7 (Docket No. 3).

[3] Specifically, the plaintiff states that she will now not become eligible for a pension until twelve years after she would have had she received the ``net credited service" promised her, thus making it necessary for her to work twelve years longer before she can retire and receive a pension.

[4] Subsequent to the removal, the plaintiff sought to file a second amended complaint to add a new count for breach of fiduciary duty under section 1104 of ERISA. *See* Plaintiff's Motion to Amend Complaint and Incorporated Memorandum of Law (Docket No. 5). She has since withdrawn that motion. *See* Plaintiff's Opposing Memorandum to Defendant's Motion to Dismiss Plaintiff's Amended Complaint at 1 (Docket No. 17).

employee benefit plan as defined in section 1002(3) of ERISA[5] and is therefore preempted by section 1144(a) of ERISA.[6] Defendant's Motion Pursuant to F.R. Civ. P. 12(b)(6) to Dismiss Plaintiff's Complaint and Defendant's Objection to Plaintiff's Motion to Amend Complaint (Docket No. 6); Defendant's Memorandum in Opposition to Plaintiff's Motion to Amend Complaint and in Support of Defendant's Motion to Dismiss Pending Complaint (``Defendant's Memorandum") at 3 (Docket No. 7). In response to the defendant's motion to dismiss, the plaintiff asserted that her claims are related not only to eligibility for the pension plan but also to a loss of benefits which do not relate to the pension plan, specifically loss of seniority, vacation pay, work schedules, shift choices, and pay scales. Plaintiff's Opposing Memorandum to Defendant's Motion to Dismiss Plaintiff's Amended Complaint (``Plaintiff's Opposition") at 2 (Docket No. 17). These claims, she argued, are not preempted by ERISA. *Id.* Subsequently, the defendant asserted that these state-law claims are preempted not only by ERISA but by section 301 of the Labor Management Relations Act, 29 U.S.C. 141 *et seq.,* as well because they are governed by the terms of a collective bargaining agreement between AT&T and the International Brotherhood of Electrical Workers

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[5] Section 1002(3) reads as follows:

> The term ``employee benefit plan" or ``plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. 1002(3). An ``employee welfare benefit plan" includes any plan or program established or maintained for the purpose of providing vacation benefits. 29 U.S.C. 1002(1).

[6] Section 1144(a) provides, in relevant part:

> [T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. 1144(a). Section 1003(b) exempts from ERISA coverage a few specific types of plans, including those maintained only for the purpose of complying with applicable workers' compensation laws or unemployment compensation or disability insurance laws.

(``IBEW''). Defendant's Memorandum in Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss (``Defendant's Reply'') at 1 (Docket No. 19). The plaintiff responded that her claims arose from representations made by the defendant and are not ``substantially dependent'' upon the collective bargaining agreement. Plaintiff's Opposition to Defendant's Memorandum in Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss (``Plaintiff's Reply'') at 7 (Docket No. 24).

STANDARD OF REVIEW

Because the defendant has submitted an affidavit and both parties have filed an agreed-upon statement of facts (``Agreed Statement'') (Docket No. 33), the defendant's motion to dismiss will be treated as one for summary judgment. Fed. R. Civ. P. 12(b). A motion for summary judgment must be granted if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and ``give that party the benefit of all reasonable inferences to be drawn in its favor.'' *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). ``Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial.'' *Id.* (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is ``material'' if it may affect the outcome of the case; a dispute is ``genuine'' only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

LEGAL ANALYSIS

I. ERISA PREEMPTION

AT&T argues that each of the plaintiff's alleged lost benefits relates to an employee benefit plan as defined in section 1002(3) of ERISA and, therefore, her claims are preempted. I agree.

ERISA establishes a comprehensive system for the federal regulation of private employee benefit plans, including both pension and welfare plans. 29 U.S.C. 1002. Its preemption provision assures that federal regulation of covered plans will be exclusive. *District of Columbia v. Greater Washington Bd. of Trade,* 113 S. Ct. 580, 582 (1992). Section 1144(a) of ERISA provides that all state laws shall be superseded ``insofar as they now or hereafter relate to any employee benefit plan described in section 1003(a) and not exempt under section 1003(b) . . . ." 29 U.S.C. 1144(a). The term ``state law" includes ``all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. 1144(c)(1). Thus, ERISA preempts state-law causes of action as they relate to employee benefit plans, even through the cause of action arises under a ``general" state law which in and of itself has no impact on employee benefit plans. *Cefalu v. B. F. Goodrich Co.,* 871 F.2d 1290, 1292 n.5 (5th Cir. 1989).

The Supreme Court has emphasized the expansive nature of ERISA preemption. *See, e.g., FMC Corp. v. Holliday,* 111 S. Ct. 403, 407 (1990) (``The pre-emption clause is conspicuous for its breadth."); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 45-46 (1987) (``[T]he express pre-emption provisions of ERISA are deliberately expansive, and designed to `establish pension plan regulation as exclusively a federal concern.'") (citation omitted); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96 (1983) (``The breadth of [1144](a)'s pre-emptive reach is apparent from that section's language.").

The key to section 1144(a) is in the words ``relate to." *Ingersoll-Rand Co. v. McClendon,* 111 S. Ct. 478, 482 (1990). The phrase ``relate to" is to be given its broad common-sense meaning. *Pilot,* 481 U.S. at 47. A state law ``relates to" an employee benefit plan ``if it has a connection

with or reference to such a plan." *Shaw,* 463 U.S. at 96-97; *see also Ingersoll-Rand,* 111 S. Ct. at 483; *Mackey v. Lanier Collection Agency & Serv., Inc.,* 486 U.S. 825, 829 (1988); *Pilot,* 481 U.S. at 47; *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739 (1985). The Supreme Court's recent *Greater Washington Board of Trade* decision emphasized the broad sweep of the phrase ``relate[s] to." Under section 1144(a), ERISA preempts any state law that ``refers to or has a connection with covered benefit plans [outside of the narrow 1144(b) exceptions[7]] `even if the law is not specifically designed to affect such plans, or the effect is only indirect,' and even if the law is `consistent with ERISA's substantive requirements.'" *Greater Washington Bd. of Trade,* 113 S. Ct. at 583 (citations omitted).[8]

In support of her position that her common-law causes of action for denial of her ``net credited service" are not preempted by ERISA because they do not ``relate to" an employee benefit plan, the plaintiff cites *Greenblatt v. Budd Co.,* 666 F. Supp. 735 (E.D. Pa. 1987), and *Morningstar v. Meijer, Inc.,* 662 F. Supp. 555 (E.D. Mich. 1987). In *Greenblatt,* the plaintiff asserted that the

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[7] Section 1144(b) provides exceptions to ERISA preemption in the areas of state criminal law, banking and insurance law, and in multiple employer welfare benefit plans.

[8] An overview of caselaw reveals the reach of ERISA preemption in multiple contexts. *See, e.g., Ingersoll-Rand,* 111 S. Ct. 478 (state-law based tort claim for wrongful discharge to prevent vesting of pension benefits was ``relate[d] to" the employee benefit plan and therefore preempted by ERISA); *Law v. Ernst & Young,* 956 F.2d 364 (1st Cir. 1992) (ERISA preempted estoppel claim based on detrimental reliance on representations by employer as to pension benefits available under early retirement); *Christopher v. Mobil Oil Corp.,* 950 F.2d 1209, 1220 (5th Cir. 1992) (claim of fraudulently-induced retirement preempted by ERISA ``[b]ecause the underlying conduct [could not] be divorced from its connection to the employee benefit plan."); *Lea v. Republic Airlines, Inc.,* 903 F.2d 624 (9th Cir. 1990) (ERISA preempted claims of negligence, breach of contract, fraud, and duty of fair representation in regard to improper calculation and distribution of retirement benefits); *Lee v. E. I. DuPont de Nemours & Co.,* 894 F.2d 755 (5th Cir. 1990) (plaintiffs' claims against former employer for fraud and negligent misrepresentation based on representations made that the company would not adopt an early retirement plan preempted by ERISA); *Lister v. Stark,* 890 F.2d 941 (7th Cir. 1989) (plaintiff's claim that he was entitled to uninterrupted service credit for years worked prior to his rehire, for purposes of calculating pension benefits, preempted by ERISA); *Cefalu v. B. F. Goodrich Co.,* 871 F.2d 1290 (5th Cir. 1989) (ERISA preempted breach of contract claims for oral misrepresentations that retirement options offered equivalent benefits); *Anderson v. John Morrell & Co.,* 830 F.2d 872 (8th Cir. 1987) (claim plaintiff orally promised fringe benefits equal to those he would have received as a union member preempted because common law governing a claimed right to modification of a contract ``relate[s] to" the plan); *Gilbert v. Burlington Indus. Inc.,* 765 F.2d 320 (2d Cir. 1985) (ERISA preempted state common-law fraud, breach of contract, unjust enrichment, and promissory estoppel claims arising from denial of severance pay).

defendant misrepresented to him the pension benefits he would receive. The court held that the cause of action was not preempted by ERISA, notwithstanding the fact that ``the subject of the deception concerned pension benefits," because the link was ``only incidental and not essential to the plaintiff's cause of action." 666 F. Supp. at 742. In other words, the cause of action did not ``relate to" the employee benefit plan. *Id.*

In *Morningstar,* the plaintiff sought damages for breach of contract, including the loss of future fringe benefits she would have received had her employment continued. The court noted that the plaintiff made no allegations that her employer had fired her to prevent her benefits from vesting or for any other improper purpose. 662 F. Supp. at 556. The court held that there was no ERISA preemption because the damage claim caused state contract law to ``relate to" ERISA ``in only a remote and tenuous manner." *Id.* at 557.

While the plaintiff's reliance on these cases is not misplaced, they are inconsistent with the majority view. Although the First Circuit has not commented directly on them, other circuits have declined to follow their approach. *See Christopher,* 950 F.2d at 1219 n.3; *Lister,* 890 F.2d at 945.

The plaintiff's reliance on *Cuoco v. NYNEX Inc.,* 722 F. Supp. 884 (D. Mass. 1989), and on *Pizlo v. Bethlehem Steel Corp.,* 884 F.2d 116 (4th Cir. 1989), is misdirected, however. In *Cuoco,* state common-law claims were found to ``relate to the NYNEX plan in `too tenuous, remote, or peripheral' a manner" to result in ERISA preemption. 722 F. Supp. at 887 (quoting *Shaw,* 463 U.S. at 100 n.21). In that case, resolution of the claims would neither ```determine whether any benefits are paid'" nor ```directly affect the administration of benefits under the plan.'" *Id.* (quoting *Gilbert,* 765 F.2d at 327). In contrast to Kelly's employee status in the present case, Cuoco was an ex-spouse of a former employee and had no rights herself under the plan. Therefore, Cuoco's claim did not arise from the deprivation of any rights, but only from verbal promises allegedly made by the defendant. *Id.* at 886. Similarly, in *Pizlo,* in which state-law claims for breach of contract, promissory estoppel, and negligent misrepresentation were held not to be preempted by ERISA, the claims did not bring into question whether the plaintiffs were eligible for plan benefits, but whether

they had been wrongfully terminated after an alleged oral contract of employment for a term. 884 F.2d at 120. In Kelly's case, however, the eligibility for transferring ``net credited service" through ``bridging" is at the heart of the matter.

This court has recently had the opportunity to examine the meaning of ``relate[s] to" for the purpose of ERISA preemption. In *Reid v. Gruntal & Co.*, 760 F. Supp. 945 (D. Me. 1991), an employee alleged that the administrator of a supplemental long-term disability insurance plan had misrepresented that the plaintiff would receive a higher level of disability benefits than were actually provided. The court held that the plaintiff's common-law claims of breach of contract, fraudulent and negligent misrepresentation, negligence, promissory estoppel, and breach of fiduciary duty were all preempted by ERISA. *Id.* at 949. As a consequence, those counts were dismissed for failure to state a claim upon which relief may be granted. *Id.* Following the Supreme Court's teaching that a state law ``relates to" a plan if it has a connection with or reference to a plan, the court framed the determinative question as whether or not the state common-law claims ``relate to" the disability policy. *Id.* at 948. The policy was part of an ``ongoing program administered by [d]efendants . . . to provide an employee benefit." *Id.* at 949. The plaintiff's claims were viewed as ``inextricably bound up with the interpretation of the terms of an employee benefit plan," and, as such, preempted by ERISA. *Id.* at 949 n.6.

Likewise, in *Bellino v. Schlumberger Technologies, Inc.*, 753 F. Supp. 391, 392 (D. Me. 1990), this court held that the plaintiff's state-law claims for breach of contract and promissory estoppel ```related to'" the employer's severance pay plan, and therefore were preempted by ERISA. Both claims ``depend[ed] entirely on the existence, operation and alleged breach of the promises embodied in the severance pay plan." *Id.* Similarly, in *Muldoon v. F.D.I.C.*, 788 F. Supp. 608, 611 (D. Me. 1992), the court held that the plaintiff's state-law claims for breach of promissory estoppel were ```related to'" the defendant's employee welfare benefit plan and therefore preempted. Both claims were said to be dependent on promises embodied in the severance pay plan. *Id.*

Even though there is a point beyond which ERISA does not reach, *see, e.g.*, *Shaw*, 463 U.S.

at 100 n.21; *Totton v. New York Life Ins. Co.,* 685 F. Supp. 27, 30 (D. Conn. 1987), the case now before the court is not in that universe. The plaintiff's protest notwithstanding, Kelly's claims do depend upon the existence of an employee benefit plan, specifically the AT&T Pension Plan. ``Net credited service" (or, more specifically, ``term of employment" and ``years and months of service"[9]) is the basis for determining pension plan eligibility and the date for distribution. *See generally* AT&T Pension Plan, 4, 7 (Attachment B to Agreed Statement). The provisions for ``bridging" are part of the plan. *See* Mandatory Portability Agreement, 2.1 (Basic Service Credit, Pension, and Related Transfer Provisions) and 2.3 (Other Non-Pension Provisions) (Attachment C to Agreed Statement); *see also* Pension Plan 7(1)(b) (Terms of Employment (Bridging)). If the plaintiff had received the ``net credited service" she expected, she would have been eligible to retire and collect her pension at an earlier date. As the plaintiff correctly states, while the court may not have to refer to the plan to compute damages, it must nonetheless refer to the plan to assess their availability. In this respect, the plaintiff's claims are inextricably bound up with the interpretation of the plan, and so ``relate to" the plan within the meaning of section 1144(a). Indeed, the claims depend upon the very existence of the plan. They are, therefore, preempted by ERISA.

II. LMRA PREEMPTION

In connection with my discussion of the ERISA preemption issue, I noted the plaintiff's contention that her claims should not be deemed to suffer ERISA preemption because they concern loss of benefits that are not related to the pension plan, specifically loss of seniority, vacation pay, work schedules, shift choices, and pay scales. Plaintiff's Opposition at 2 (Docket No. 17). The defendant argues that since the collective bargaining agreement (``CBA") between AT&T and the IBEW governs these terms of her employment, Kelly's claims are preempted by the LMRA as well

[9] These terms are defined in the AT&T Pension Plan, 2.

as by ERISA. Defendant's Reply at 1 (Docket No. 19). Kelly has been covered by the terms of a CBA since she was hired by AT&T. Affidavit of Paula Moses (Moses Affidavit) 2-3 (Docket No. 21). In the interest of completeness, I will address the defendant's LMRA preemption claim as well.

Assuming, *arguendo,* that ERISA preemption does not apply,[10] the plaintiff's claims would nevertheless be preempted by section 301 of the LMRA, 29 U.S.C. 185. This statute provides that:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. 185(a).

Like ERISA, the preemptive force of section 301 is broad in scope. Although ``not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by 301," *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 211 (1985), ``when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a 301 claim . . . or dismissed as pre-empted by federal labor-contract law,"[11] *id*. at 220 (citation omitted).

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[10] It should be noted that the AT&T Pension Plan and the CBA are not completely independent of one another, but, rather, are related by the workings of ``net credited service." Article G4.04 of the CBA states, in part, that ``[s]eniority shall be determined by the Net Credited Service of the employees affected." Art. G4.04, Agreement between AT&T and IBEW, Effective May 28, 1989 (``Agreement") (Exh. A to Moses Affidavit). ``Net credited service," in turn, is defined as ```term of employment' as set forth in the Pension Plan applicable to employees covered by this Agreement." *Id.* The seniority acquired through ``net credited service" determines, in part, the plaintiff's wages (Art. G17.04 and App. 4 of Agreement), vacation schedule (Art. G14.09, Agreement), and work shifts (Art. OS2.02(f), Agreement). This is a further indication that the plaintiff's claims for loss of these benefits are inextricably intertwined with the Pension Plan and so are preempted by ERISA.

[11] In *Allis-Chalmers,* the Court held that section 301 preempted a union employee's state-law tort action for bad faith handling of an insurance claim. The Court noted that analysis must focus ``on whether the [state] tort action for breach of the duty of good faith . . . confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or,

Section 301 preempts a state tort law where assessment of the claim is ``inextricably intertwined with consideration of the terms of the labor contract." *Id*. at 213.

The prevailing standard for assessing section 301 cases is set out in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). The application of state law is preempted only if it requires the interpretation of a CBA. *Id*. at 413. If a state-law claim is sufficiently independent of the CBA, section 301 will not preempt the claim. *See id*. n.12.

Lingle compels the conclusion that section 301 preempts the plaintiff's claims. The CBA between AT&T and IBEW is the immediate source of the plaintiff's rights concerning seniority, vacation, and shift choices. Because her claims are substantially dependent on the terms of the CBA, the LMRA preempts them to deprive the plaintiff of a cause of action for which the court may grant relief.

``[A] plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective bargaining agreement." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 396 (1987) (emphasis in original). The plaintiff maintains that even if she were subject to a CBA, she had an independent contract, through AT&T's oral representation, which was breached when her seniority rights were denied, and that, therefore, she has a state-law based claim. However, the court may look beyond the face of the complaint to determine whether that which appears to be a state-law claim is in fact a section 301 claim for breach of a collective bargaining agreement ```artfully pleaded' to avoid federal jurisdiction." *Magerer v. John Sexton & Co.*, 912 F.2d 525, 528 (1st Cir. 1990) (citing *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997 (9th Cir. 1987)). In the case now before the court, resolution of the plaintiff's claims depends on the existence and interpretation of the CBA. For that reason, I conclude that they are preempted by the LMRA.

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instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." 471 U.S. at 213.

CONCLUSION

For the foregoing reasons, I recommend that the defendant be ***GRANTED*** summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 31st day of March, 1993.

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David M. Cohen
United States Magistrate Judge